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No. 76-1383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CHRISTIANSBURG GARMENT COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* of the Equal Employment Advisory Council (EEAC) is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary, non-profit association, organized as a corpora-

[1] Their consent has been filed with the Court Clerk.

tion under the laws of the District of Columbia. Its membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (The Act or Title VII). As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, which involve the proper standard to be applied to determine when prevailing defendants should be awarded attorney's fees against the Equal Employment Opportunity Commission (EEOC).

FACTS AND DECISION BELOW

The facts of this case are discussed in detail in the brief of the petitioner, the Christiansburg Garment Company (herein Christiansburg). Those facts which have particular relevance to this brief *amicus curiae* are set forth briefly below.

In July 1975, after successfully defending itself against a suit brought by the EEOC,[2] Christiansburg

[2] The EEOC had filed the suit in January 1975, some 4½ years after the charging party elected not to sue in her own behalf. The district court granted summary judgment in Christiansburg's favor, because the charge on which the suit was based was not pending before the Commission when the 1972 amendments took effect authorizing the EEOC to commence suits in its own name with respect to "pending" charges. See Section 14 of Pub. L. 92-261, 86 Stat. 103 (March 2, 1972).

sued the EEOC for attorney's fees pursuant to Section 706(k) of Title VII. The district court denied the employer's petition, stating that the EEOC had brought the initial suit in good faith and that its action could not be characterized as unreasonable or meritless (Pet. App. 2-A and 3-A).

Before the Fourth Circuit, the EEOC conceded that the district court had the authority under the statute to award attorney's fees against it, but argued that the district court properly denied the company's request. The Fourth Circuit agreed, adopting the standard approved by the Third Circuit in *United States Steel Corporation* v. *United States*, 519 F.2d 359, 364, 10 FEP Cases 1106, 1109 (3rd Cir. 1975), for the award of attorney's fees against the EEOC, that is:

> The indicia associated with the grant of an attorney's fee—vexatiousness, bad faith, abusive conduct, or an attempt to harass or embarrass . . . (Pet. App. 8-A).

In dissent, Judge Widener stated that this formula created a double standard in the application of Title VII (Pet. App. 10-A to 13-A). Thus, while prevailing defendants must meet the strict *U.S. Steel* standard, successful plaintiffs ordinarily recover such fees unless special circumstances would render the award unjust. The dissent argued that permitting equality of recovery of attorney's fees by Title VII defendants

and plaintiffs was not inconsistent with Congress' policy to eliminate discrimination in employment. Noting that a merely colorable, though meritless, suit is easily brought, Judge Widener pointed out that "where the government is the plaintiff, with its limitless resources and sensitivity to the political winds of the moment, it should not be allowed to escape attorney's fees by hiding behind a double standard." (Pet. App. 13-A). He further suggested that "this is not the level floor the courthouse demands." (*Id.*).

In its petition before the Court, the employer argues that prevailing plaintiffs and defendants in Title VII cases should be awarded attorney's fees under the same standard. For the reasons set forth below, the *Amicus*, EEAC, supports the employer's arguments as being consistent with Congressional intent and with the purposes of Title VII.

I. PROPER INTERPRETATION OF SECTION 706(k) REQUIRES APPLICATION OF THE SAME STANDARD FOR AWARDS OF ATTORNEY'S FEES TO ALL "PREVAILING" PARTIES

The dispute in this case centers around the proper interpretation of Section 706(k) of Title VII,[3] which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

[3] 42 U.S.C. § 2000e-5(k).

The court below recognized that even though an award of attorney's fees in Title VII cases ostensibly is a discretionary matter, in practice such discretion is narrowly exercised when the section is applied to private Title VII plaintiffs. Absent special circumstances, attorney's fees are awarded to prevailing plaintiffs as a matter of course. Pet. App. 7-A, and cases there cited. See also *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968); and *Clanton* v. *Allied Chemical Corp.*, 409 F.Supp. 282, 12 FEP Cases 1115 (E.D. Va. 1976), and cases there cited. The court concluded, however, that this rule should not apply to prevailing defendants where the EEOC was the unsuccessful plaintiff. A proper reading of the statute, however, indicates that this conclusion was erroneous.

First, the language of Section 706(k) indicates that awards to prevailing plaintiffs and defendants should be made upon the same standard. Where there is a statutory purpose to provide disparate treatment, Congress on other occasions has made that intent clear. For example, the Fair Housing Act (42 U.S.C. § 3612(c)) provides that the court may grant "reasonable attorney fees in the case of a prevailing *plaintiff*: *Provided*, That said *plaintiff* in the opinion of the court is not financially able to assume said attorney's fees" (emphasis added). Section 3612(c) does not make a similar fees award to prevailing defendants. The lack of such a double standard in the language of Title VII provides initial evidence that a like standard was intended for prevailing parties on either side.

Second, this Court has recognized that even where there is no specific statutory authority permitting an attorney's fees award, the federal courts, in the exer-

cise of their inherent equitable powers, may award attorney's fees when the interests of justice so require. See *Hall* v. *Cole*, 412 U.S. 1, 4-5, 83 LRRM 2177, 2178 (1973). Thus, "it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." (*Id.*) See also *Newman* v. *Piggie Park Enterprises*, *supra*, 390 U.S. at 403; and *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). Thus, the court below and in *United States Steel* (see *supra*, p. 3) have interpreted Section 706(k) as permitting the payment of attorney's fees to defendants only in those circumstances under which they could have been awarded even if Section 706(k) had not been enacted. But as this Court stated in *Newman* v. *Piggie Park* in rejecting an analogous argument, had that been Congress' objective, "no new statutory provision would have been necessary . . ." (390 U.S. at 402 n.4).

Third, as set forth more fully in the employer's brief and petition for certiorari, there is nothing in the legislative history of Section 706(k) to indicate that Congress intended to award attorney's fees differently to plaintiff's and defendants, especially where the EEOC was the unsuccessful plaintiff.

II. IMPORTANT POLICY CONSIDERATIONS SUPPORT REJECTION OF THE STRICT STANDARD IMPOSED BY THE COURT BELOW FOR AN AWARD OF ATTORNEY'S FEES AGAINST THE EEOC

As shown, the specific statutory language and legislative history indicate that Section 706(k) requires the EEOC to pay attorney's fees to prevailing de-

fendants whenever the agency's suit is unsuccessful. Neither the statute nor this history support the Fourth Circuit's holding that the agency must pay attorney's fees only when there was an absence of "good faith" on the EEOC's part. Lacking such direct statutory authority, the court below relied upon policy considerations which were formulated for another context—the award of attorney's fees to successful Title VII *private* plaintiffs. First, the court noted that private persons often act as "private attorneys general" in furthering Congress' goal of eliminating discriminatory employment practices. (Pet. App. 7-A). Apparently, the court concluded that an award of attorney's fees, even where the EEOC acted "unreasonably," would unduly inhibit the EEOC's enforcement of the Act. Second, the court cited language in the *United States Steel* decision of the Third Circuit (*supra*, 519 F.2d at 364; 10 FEP Cases 1108-1109) (Pet. App. 7-A to 8-A)) which stated:

> A prevailing defendant seeking an attorney's fee does not appear before the court cloaked in a mantle of public interest. In contrast to the advantage to the public that inheres in a successful attack against discriminatory practices, as in Piggy [sic] Park, one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination. Instead, a defendant seeking a counsel fee under Section 706(k) must rely on different equitable considerations. A factor frequently considered in awarding an attorney's fee is the proper conduct of a plaintiff. The standard of improper conduct, it would seem, would apply against the EEOC much as it would against a private party. Where a court finds that a pro-

> ceeding was maintained in bad faith, imposition of a counsel fee against a government plaintiff may be appropriate.

These arguments, however, misapply the private attorney general concept to the EEOC and completely disregard the role of Title VII defendants in the legislative scheme.

A. Awarding Attorney's Fees to a Prevailing Defendant, Absent Special Circumstances, Will Encourage the EEOC's Proper Administration of the Statute

Although the *Amicus* recognizes both that private persons often play an important role in enforcing Congressional policy, and that the EEOC has a mandate to eliminate employment discrimination, the principles underlying each concept are not necessarily applicable to the other. "Private attorney general" litigation (often characterized as "public interest litigation") has an important element *not* present in the instant case, which is

> that it is brought by a private plaintiff rather than by a governmental agency. It does not matter whether the plaintiff is an individual, a group of persons or an organization; the crucial element is that the plaintiff *does not have an obligation under the law* to initiate the type of lawsuit that has been brought. Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. Rev. 301, 305 (1973) (emphasis added).

Because no legal obligation to undertake such suits exists for private plaintiffs, the courts have indicated that an incentive to bring such suits might be diminished if attorney's fees often were denied under too strict a standard.[4]

Such attorney's fees considerations as pertain to private plaintiffs, however, are not transferrable to a case where the government is the unsuccessful plaintiff. As the court stated in *United States* v. *Gray*, 319 F.Supp. 871, 872 (D.R.I. 1970):

> In the instant case, in which the United States is the party plaintiff, the policy expressed in [*Piggie Park*], of encouraging private enforcement of the Civil Rights Act, is inapplicable, *since the Attorney General presumably needs no incentive* to bring an action to enjoin racial discrimination (emphasis added).

Thus, Section 706(a) of Title VII requires the EEOC to investigate, conciliate, and if necessary prosecute those charges filed with it alleging employment discrimination. No further incentive is required.

Moreover, as the EEOC is the primary enforcer of Title VII, "[t]he court may properly expect the EEOC to have expertise in fair employment law and thus to be more competent than a private plaintiff in determining which cases are unreasonable." Vining, *Title VII, Civil Rights Act of 1964: Standards for Award of Attorney's Fees to Prevailing Defendants*,

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[4] *See e.g., Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (5th Cir. 1971). *But cf., Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Although the Court in *Alyeska* denied the plaintiff's request for attorney's fees, it did so because, unlike the instant case, there was no specific statutory authorization permitting the award. 421 U.S. at 263-68. The government's reliance on *Alyeska*, therefore, is unpersuasive. (*See* EEOC Op. Cert. at p. 7).

1976 Wis. L. Rev. 207, 228.[6] If such authority is *properly* exercised, therefore, the function of Section 706(k), "to insure that the EEOC does not commence groundless actions," [6] need not be invoked often.

It is extremely unlikely that an award of attorney's fees under the standard proposed by Christiansburg would have an *unwarranted* inhibiting effect upon the EEOC's enthusiasm in enforcing the statute. Indeed, the past history of EEOC's enforcement of the Act would lead to the directly opposite conclusion. While we know of no cases documenting any lack of interest on the part of the EEOC in carrying out its statutory duties, there are a considerable number of instances in which the courts have awarded attorney's fees against the agency, and, in so doing, have expressed concern that less zeal and more circumspection by the EEOC would have been appropriate.[7] Were the EEOC

[5] As to the EEOC's expertise, *see generally, Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431, 10 FEP Cases 1181, 1192 (1975), *citing Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34, 3 FEP Cases 175, 179 (1971).

[6] *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1096, 8 FEP Cases 897, 904 (6th Cir. 1974). *Accord, United States* v. *Gray, supra*, 319 F. Supp. at 872.

[7] *See e.g., EEOC* v. *Anchor Continental, Inc.*, —— F.Supp. ——, 15 FEP Cases 90, 92-96 (D.S.C. 1977); *EEOC* v. *Western Electric Co.*, 10 FEP Cases 1275, 1276 (D. Md. 1975); *EEOC* v. *New Enterprise Stone & Lime Co.*, —— F. Supp. ——, 15 FEP Cases 25, 28, 29-30 (W.D. Pa. 1977); *EEOC* v. *Service Container Corp.*, 418 F.Supp. 898, 901 (W.D. Okla. 1976); *EEOC* v. *South Carolina Bank*, 12 FEP Cases 1565 (D.S.C. 1976); *EEOC* v. *Moore Group, Inc.*, —— F. Supp. ——, 12 FEP Cases 868, 871 (N.D. Ga. 1976); *EEOC* v. *Carter Carburetor*, —— F.Supp. ——, 14 FEP Cases 665 (E.D. Mo. 1977).

to follow the principles set forth in those decisions, it is likely that awards of attorney's fees against it would be infrequent, even if generally granted where the agency does not prevail.[8]

Moreover, past experience again demonstrates that any administrative costs of attorney's fees would not unduly restrict the interest of the agency in prosecuting alleged violators. Indeed, the EEOC's backlog and other administrative difficulties [9] have not prevented it from enthusiastically attempting to continue suits which had been delayed apparently because of administrative burdens.[10]

[8] It also has been pointed out that "[b]ecause the EEOC is likely to be more able to absorb awards than a private plaintiff and because the agency's basic function is to eradicate discrimination, the award of fees is less likely to have serious impact on discouraging meritorious EEOC suits." See Vining, *supra*, 1976 Wis. L. Rev. at 228.

[9] *See generally, Occidental Life Insurance Co.* v. *EEOC*, 45 U.S.L.W. 4752, 4756 & nn.24-25, 14 FEP Cases 1718, 1724-1725 & nn.24-25 (1977).

[10] The agency's ardor is illustrated by several cases which have been dismissed because of laches on the part of the EEOC. *See e.g., EEOC* v. *American National Bank*, 420 F.Supp. 181 (E.D. Va. 1973), *appeal docketed*, No. 74-2462 (4th Cir.); *EEOC* v. *C & D Sportswear Corp.*, 398 F.Supp. 300, 10 FEP Cases 1131 (M.D. Ga. 1975); *EEOC* v. *American Machine & Foundry, Inc.*, 13 FEP Cases 1634 (M.D. Pa. 1976); *EEOC* v. *J. C. Penney Co.*, 12 FEP Cases 640 (N.D. Ala. 1975); *EEOC* v. *South Carolina National Bank*, 12 FEP Cases 843 (D.S.C. 1976), *appeal docketed*, No. 76-1977 (4th Cir.); *EEOC* v. *Moore Group, Inc., supra*, 12 FEP Cases at 871.

Even assuming that an attorney's fees award would have discouraged pursuit of these suits, the response of these several courts would seem to be that the enforcement of Title VII would not thereby have been restricted unnecessarily.

From the foregoing, therefore, it is evident that the "private attorney general" rationale of the court below is not applicable to the EEOC." Moreover, it is unlikely that the proper enforcement of Title VII would be inhibited by the attorney's fees standard sought by petitioner Christiansburg.

As shown, as its basic argument, the employer urges the Court to apply the rule in *Newman* v. *Piggie Park* equally to both Title VII plaintiffs, and those defendants who prevail against the EEOC. Under this standard, attorney's fees generally would be available to all prevailing parties, absent special circumstances. 390 U.S. at 401. Should the Court not find this standard appropriate, however, the *Amicus*, EEAC, would urge the Court that the EEOC's "reasonableness" rather than its "good faith" should be the proper standard. Such a standard should be applied equally to both successful plaintiffs and defendants. There are several arguments favoring the "reasonableness" formula. Even in cases where courts have expressed concern about the agency's zeal in pursuing alleged violators (see footnotes 7 and 10 above), it is extremely doubtful that such actions could be shown to have been taken in bad faith. Thus, as the Court stated in *EEOC* v. *Western Electric Co.*, *supra*, if the good faith standard were applied, "then zealous EEOC attorneys would be encouraged to

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" Thus, the Second Circuit's decision in *Carrion* v. *Yeshiva University*, 535 F.2d 722, 726-729 (2d Cir. 1976), is distinguishable. There, the court concluded that the good faith standard set forth in *United States Steel* was applicable to an unsuccessful *private* plaintiff, and awarded attorney's fees to the defendant employer because of the plaintiff's meritless claim. Attorney's fees from the EEOC were not an issue.

abuse and circumvent the necessary administrative proceedings prior to the filing of a judicial action under Title VII. This Court will not encourage such unreasonable conduct." 10 FEP Cases at 1276. Accordingly, several courts have rejected the subjective *good faith* test and awarded attorney's fees when the agency's actions were deemed *unreasonable*. See *EEOC* v. *Western Electric*, *supra*; *EEOC* v. *South Carolina National Bank*, *supra*, —— F.Supp. ——, 12 FEP Cases at 1565; and *EEOC* v. *Service Container Corp.*, *supra*, 418 F.Supp. at 901. *And cf.*, *Kaye* v. *Burns* (*Arthur F.*), 411 F.Supp. 897, 904 (S.D.N.Y. 1976) (no attorney's fees available where the government's interest in withholding documents has "at least a reasonable basis" in law).

B. Successful Title VII Defendants Play an Important Role in Assuring That The Statute Is Properly Administered

As noted above, p. 7, both the court below and that in *U.S. Steel* adopted the "good faith" standard for awards of attorney's fees to prevailing defendants because "one cannot say as a general rule that substantial public policies are furthered by a successful defense against a charge of discrimination." See Pet. App. 7-A and 519 F.2d at 364. This conclusion, however, ignores many legal and practical realities of Title VII litigation which other courts have recognized.

As a starting point, it has been noted that:

> the court has a legitimate role in protecting individuals from abuse of governmental power. The EEOC has more potential than private plaintiffs for serious abuse of defendants because of its

money, its pool of expertise, and its broad powers to compel production of records and cooperation. The EEOC also has the power to take actions which damage the interests of the complainant. Vining, *supra*, 1976 Wis. L. Rev. at 229.[12]

Accord: *EEOC* v. *South Carolina Bank*, *supra*, 12 FEP Cases at 1565 ("The awarding of reasonable attorney's fees as a part of the cost to the prevailing party is one way of putting some check on the ever expanding bureaucracy and its abuse of power").

Additionally, as the district court pointed out in a recent Title VII case, the function of a government attorney is somewhat different from that of a private attorney:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [13]

It is clear, moreover, that courts alone cannot fulfill their function of governmental oversight, and that they often receive important assistance from defendants who have been accused improperly of statutory violations. See the cases cited above, nn. 7 and 10.

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[12] As noted above, p. 4, the dissent in the instant case felt that the same fees standard should apply to successful plaintiffs and defendants "[e]specially where the government is the plaintiff, with its limitless resources and sensitivity to the political winds of the moment. . ." (Pet. App. 13-A).

[13] See *EEOC* v. *New Enterprise Stone & Lime Co.*, *supra*, 15 FEP Cases at 29, quoting Mr. Justice Sutherland's remarks in *Berger* v. *United States*, 295 U.S. 78 (1934).

The decisions which have awarded attorney's fees against the EEOC (see n. 7, *supra*) strongly suggest that the successful defense against meritless EEOC-brought cases serve an important public policy in assuring that the government does not overstep the limits of its power and attempt to require defendants to take actions beyond that which the law requires.[14] It seems evident, therefore, that innocent party defendants who have assisted in this important public function should not thereafter be required to bear the financial burden of assuring that the government operates legitimately. It is the *Amicus*' position that these principles apply to successful defenses in general, and most assuredly when the agency proceeds in an "unreasonable" manner.[15]

C. The Complex and Costly Nature of Title VII Litigation Supports the Conclusion that Attorney's Fees Usually Should Be Awardable to Successful Defendants

There are other compelling reasons why an award of attorney's fees against the EEOC should be awardable as a general rule and not only when the agency

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[14] *See e.g.*, *EEOC* v. *Anchor Continental, Inc.*, *supra*, 15 FEP Cases at 93, where the court expressed its concern for the agency's attempts to "harass the defendant into making some type of settlement."

[15] *See generally*, *Securities & Exchange Commission* v. *Capital Counselors, Inc.*, 378 F.Supp. 224, 227 (S.D.N.Y. 1974), aff'd 512 F.2d 654 (2d Cir. 1975), where the court held that "where prosecution *or defense* of an action under the federal securities laws has been in furtherance of the purpose of those laws—protection of the public investor—then the parties bearing the costs of such prosecution *or defense* are entitled to reimbursement" (emphasis added).

has acted in "bad faith." These reasons derive from the complex, costly and often transitory nature of Title VII litigation and its governing principles. With the possible exception of antitrust cases, court cases brought under Title VII are among the most complex presented to our legal system. Individual claims of discrimination which are investigated by the EEOC commonly expand into class actions which involve allegations of discrimination not indicated by the charging party.[16] These class actions frequently grow to mammoth proportions and take years to investigate and litigate.[17] Such litigation often results in ultimate reversal or modification of the legal principles initially applied by the EEOC or lower courts.[18]

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[16] *See e.g., EEOC* v. *General Electric Co.*, 532 F.2d 359, 12 FEP Cases 21, 25 (4th Cir. 1976); and *EEOC* v. *D. H. Holmes Co., Ltd.*, No. 76-4184, slip op. at 4800-01, 4804 n.14, and 4806 (5th Cir. July 29, 1977), *petition for rehearing pending* (charges alleging discrimination against five individuals expanded by EEOC into a wide-ranging class action which the Fifth Circuit characterized as "an investigation in search of a plaintiff." *Id.*, at 4806).

[17] For example, this Court recently heard several such cases involving trial and appeal records of immense size. See *Teamsters* v. *United States*, and *T.I.M.E.-D.C.* v. *United States*, 45 U.S.L.W. 4506, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriquez*, 45 U.S.L.W. 4524, 14 FEP Cases 1505 (1977); and *United Air Lines* v. *McDonald*, 45 U.S.L.W. 4760, 14 FEP Cases 1711 (1977).

[18] In *Washington* v. *Davis*, 426 U.S. 229, 12 FEP Cases 1415, 1421 & n.12, this Court criticized several courts of appeals' decisions which were contrary to its holding. Also, the dissent in *Teamsters* v. *United States* pointed to several lower court decisions which it felt were at odds with the majority's interpretation of Section 703(h) of the Act. See 45 U.S.L.W. at 4520 n.2, 14 FEP Cases at 1537 n.2. Additionally, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 13 FEP Cases 1657 (1976), the Court's ruling concerning pregnancy disability payments reversed not only the lower court (and several other courts, *sub silentio*), but also the EEOC's regulation on the matter.

In many instances, review by this Court produces guidelines for the processing of Title VII litigation which may require the remand or retrial of cases already completed.[19] Indeed, the decision in *Teamsters* v. *United States*, *supra*, established guidelines impacting on virtually every stage of Title VII litigation.

It is evident, therefore, that in an area of the law which is exceedingly complex, and where the governing legal principles are changing constantly, successful Title VII defendants incur ever-expanding legal costs in assisting the courts in determining the proper interpretation of the requirements of Title VII. Clearly, the successful defense against Title VII allegations which are proved meritless is extremely burdensome, even to larger employers who must make substantial internal adjustments to finance such litigation. And as several courts have recognized:

> unmeritorious complaints under the Act could produce *as serious a burden on commerce as the discrimination which it forbids*, and thus some measure of control should be vested in the courts toward the prevention of such a burden. *Bell* v. *Alamatt Motel*, 243 F.Supp. 472, 474 (N.D. Miss. 1965) (emphasis added).[20]

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[19] *See e.g., Sabala* v. *Western Gillette Inc.*, 516 F.2d 1251, 11 FEP Cases 98 (5th Cir. 1975), *judg. vacated and remanded* in light of the decision in *Teamsters* v. *United States*, 45 U.S.L.W. 3786, 14 FEP Cases 1686 (June 7, 1977).

[20] See also *United States* v. *Gray supra*, 319 F.Supp. at 873; and *EEOC* v. *Western Electric Co., supra*, 10 FEP Cases at 1277, both quoting *Bell* v. *Alamatt* with approval.

Moreover, it is important to recognize that, like the instant case, a substantial number of Title VII cases do *not* involve large, nationwide corporations that are better able to bear the costs of litigation than an economically deprived individual plaintiff. Rather, Title VII cases often pit small- to-medium-sized employers against the vaster resources of the federal government.[21] In those circumstances, the costs of mounting a successful defense not only constitute a "burden on commerce", but also may be crucial to the operations and even economic survival of the employer.

The *Amicus*, EEAC, shares the concern of several district courts that the costs of Title VII litigation have become so burdensome that an imbalance of resources available to the government and private defendants may be so great as to impair the proper enforcement of Title VII.[22] Citation to a few district court cases illustrates the point. In *EEOC* v. *South Carolina Bank*, *supra*, 12 FEP Cases at 1566, the court stated that:

> Many persons associated with EEOC do not seem to realize the expense involved in defending against its charges and producing the voluminous

[21] Many of the constituents of EEAC's trade association members are companies of this size, and have experienced the economic impact of such litigation first hand.

[22] As the Fifth Circuit has noted, Section 706(k) "was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to fairly place the economical burden of Title VII litigation." *Johnson* v. *Georgia Highway Express*, 488 F.2d 714, 719, 7 FEP Cases 1, 5 (5th Cir. 1974). We submit that this proposition applies not only to private plaintiffs as in *Johnson*, but also, at minimum, to small-employer Title VII defendants.

> records demanded under its subpoenaes [sic]. This Court has tried a number of cases where the documents produced in the courtroom numbered in the thousands and had to be trucked to the courthouse all at the expense of the employer. The cases involving small businesses have practically shut down production while the litigation is in progress due to the number of witnesses that had to remain in the courtroom during the trial.

A similar concern was expressed in *EEOC* v. *Anchor Continental, Inc.*, *supra*, 15 FEP Cases at 94, 95:

> Having tried a number of Title VII suits this Court is well aware of the enormous amount of time, energy and money required to litigate in this area. (*Id.* at 94).
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> • • • •
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> The plaintiff [EEOC] shows no concern for the terrible financial burden it is placing upon the defendant; no concern for the disruptive effect its action may have upon the defendant's business or its personnel relations; no concern for the time defendant's employees must spend in gathering the information plaintiff has already requested and will in the future request; no concern for the effect this expense and disruption of the defendant's business may have upon the survival of the defendant as a going concern and the jobs of the 340 other people working for defendant without complaints of discrimination.
>
> Equally important is the plaintiff's utter disregard for the caseload of this Court and the enormous amount of court time required to try this type case. (*Id.*, at 95)

Accord: EEOC v. *New Enterprise Stone & Line Co., supra,* 15 FEP Cases at 29 ("It is not inconceivable that a small company could literally be put out of business by the cost of having to be represented at hearing after hearing over frivolous side issues."); and *EEOC* v. *Western Electric Co., supra,* 10 FEP Cases at 1277.

Because of these considerations, even if this Court should find that attorney's fees are not to be available generally to successful Title VII defendants, the *Amicus* urges the Court to endorse the fees standard set forth in *EEOC* v. *Service Container Corp., supra,* 418 F.Supp. 898. There, the court concluded that despite the EEOC's "good faith beliefs" in bringing the suit, "[c]onsiderations regarding Defendant's *size* and *financial stature* and the *impact* of this litigation *on its operation* dictate in the opinion of the Court that [the Defendant] should recover a reasonable attorney's fee herein" (*Id.*, at 901) (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit below should be vacated, and the employer awarded attorney's fees.

Respectfully submitted,

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